IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

NO. .....

COMMONWEALTH TRUST COMPANY OF PITTSBURGH and J. KNOWLES WOODWELL, Executors of the Estate of John W. Herron, Deceased,
Petitioners,

v.

WILLIAM DRISCOLL, Individually and as Former Collector of Internal Revenue for the Twenty-third Collection District of Pennsylvania.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions Below.

The opinions below are reported and appear in the record as shown on page 2 of this Petition.

II.

Jurisdiction.

The Decision of the Circuit Court of Appeals and its Order affirming Judgment was filed July 9, 1943. A

petition for rehearing was filed July 24, 1943. Rehearing denied September 20, 1943, and an order entered on the same date.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (Sec. 347 of Title 28 USCA).

III.

Statement of the Case.

A summary statement of the case is contained in pages 3 to 7 of the Petition filed in this case.

IV.

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In holding that the only motive for the transfers of property made by decedent in 1932 was to save Federal Estate taxes and that said transfers were therefore made in contemplation of death.

(2) In holding that because the transfers made by the decedent in 1932 were made with the intention of saving Federal Estate taxes, this must have been the sole and controlling motive and the transfers must have been made in contemplation of death.

(3) In holding that irrespective of donor's good health and business activities, and of other circumstances evidencing life motives and evidencing that thoughts of life motivated decedent's actions, the finding that the transfers were made with the intention of

avoiding liability for Federal estate taxes must be adopted as the controlling or only motive for said transfers.

(4) In holding that the right reserved to the settlor to make substitution of securities in the trust created on November 18, 1922, constituted the reservation of a power to "alter, amend or revoke" the trust instrument within the purview of Section 302(d) of the Revenue Act of 1926, as amended.

V.

Argument.

THE DECISION IN THIS CASE THAT THE TRANSFERS WERE MADE IN CONTEMPLATION OF DEATH, IS IN APPARENT CONFLICT WITH OTHER CIRCUIT COURTS OF APPEAL AND WITH DECISIONS OF THIS COURT.

The Court's opinion is in apparent conflict with the applicable decisions of this Court and decisions of other Circuit Courts of Appeal on similar matters. It was stated by this Court in *Colorado National Bank of Denver v. Commissioner,* 305 U.S. 23, as follows: (p. 27)

"The court's opinion seems to rest upon an erroneous interpretation of the term 'in contemplation of death.' The meaning of this was much discussed in United States v. Wells, supra. We adhere to what was there said. The mere purpose to make provision for children after a donor's death is not enough conclusively to establish that action to that end was 'in contemplation of death.' Broadly speaking, thoughtful men habitually act with regard to ultimate death but something more

than this is required in order to show that a conveyance comes within the ambit of the statute."

A transfer made with the intention of avoiding Federal Estate tax is an act taken with regard to ultimate death in the same sense as is a transfer of property made in lifetime with the intention of providing income for the donor's children after his death. This Court has therefore said with respect to such a transaction that something more must be shown in order to bring it "within the ambit of the statute."

This principle was relied upon and followed in the case of *Blakeslee et al. v. Smith,* 110 F. (2d) 364, (C.C.A. 2nd), in which the trial court found that the settlor, at the age of 73 years, was in good health, was vigorous and active, and that the transfers were not made in contemplation of death. The court said: (p. 366)

> "There being a substantial basis in the evidence for the finding that the settlor was actuated by considerations not flowing from the apprehension of death, the statute relied on is not applicable even though there was an intent to provide for the settlor's children after his death. Colorado Bank v. Commissioner, 305 U.S. 23, 59 S. Ct. 48, 83 L. ed. 20; See also, United States v. Wells, 283 U.S. 102, 51 S. Ct. 466, 75 L. ed. 867."

In *United States v. Wells,* 283 U.S. 102, this Court said at page 115:

> "It is recognized that the reference is not to the general expectation of death which all entertain. It must be a particular concern, giving rise to a definite motive."

at page 117:

> "As a condition of body and mind that naturally gives rise to the feeling that death is near, that the donor is about to reach the moment of inevitable surrender of ownership, is most likely to prompt such a disposition to those who are deemed to be the proper objects of his bounty, the evidence of the existence or nonexistence of such a condition at the time of the gift is obviously of great importance in determining whether it is made in contemplation of death."

THE OPINION IN THIS CASE IS AT VARIANCE WITH THE PRINCIPLES ANNOUNCED IN *Denniston v. Commissioner,* 106 F. (2d) 295, (C.C.A. 3).

It is to be assumed that the Circuit Court of Appeals in this case did not intend to overrule its own decision in the case of *Denniston v. Commissioner, supra.* However, the present decision seems to completely ignore the principles there announced, as well as the principles of the case of *Colorado National Bank of Denver v. Commissioner, supra.*

The Circuit Court of Appeals for the Third Circuit, in *Denniston v. Commissioner, supra,* stated the question as follows: (p. 927)

> "The question remains, however, whether the fact that a transfer was made to avoid estate tax is, without any other evidence of a motive associated with death, sufficient to support an ultimate finding or conclusion that the transfer was made 'in contemplation of death', within the meaning of Section 302 of the Revenue Act."

The answer of the court appears on page 928:

"We think that because in carrying out a plan to provide for her children the donor uses a method which she thinks is best calculated to save death taxes the conveyance is not thereby conclusively stamped as 'in contemplation of death'. The desire to avoid estate taxes may be just as clearly present in the mind of a young and vigorous donor who thinks of death as far distant as in that of one who is old and feeble and who looks momentarily for its coming. Standing alone it cannot be deemed conclusive of a mental state such as is contemplated by the statutory phrase 'contemplation of death.' "

* * * * * * *

"We think that the petitioners adequately overcame the presumption in favor of the Commissioner's ruling by the uncontradicted evidence that the policy of the deceased was to divide her estate equally among her children as is shown by the trust deed executed by her nineteen years prior to her death; that at the time of the 1932 transfers she was a vigorous, robust woman with better than average health for one of her age; and that she was planning her activities for the future without any fear of failing health or impending death."

The situation in the instant case is entirely analogous. The record shows that decedent, at the age of 80½ years transferred to his wife his interest in the homestead and garage properties which came to him and his sister by inheritance from their mother. (R. 95 a), and had theretofore been held by entireties. The value of these properties was only 6.43% of his gross estate, and 7.66% of the value of his estate at date of distribu-

tion. (R. 55 a-57 a). Neither property transferred was income producing, and following transfer decedent owned no other real estate except a vacant lot held for investment. (R. 36 a).

The transfers were made nine months before the decedent executed his Last Will and Testament and more than five years before his death. At the time of the transfers decedent was in good health, was active in business, was at his office almost daily, and was in constant contact with his business associates and others. Decedent never spoke of death or discussed such matters with his associates and was planning for the future and expected to outlive his father, who had died in his late nineties. (R. 13 a).

Such readjustment of the record ownership of his non-income producing home properties, whether for convenience of transfer or other personal life reasons is a common practice as frequently adopted by a young man as by an older man.

The present decision is, therefore, supported only by the finding that the transfers were made to avoid estate tax and under the authority of the *Denniston* case, *supra,* such motive, standing alone, is not sufficient to support an ultimate finding or conclusion that the transfers were made "in contemplation of death."

Motive depends on the decedent's state of mind and it may or may not have been communicated to others, and indeed, he may not even have analyzed for himself what his dominant purpose was in making a particular transfer. It is not the purpose of the law to place upon

the petitioner in this type of case a task or burden which is impossible of accomplishment. The maximum obligation of the petitioner is to show the Commissioner's determination to be erroneous. The presumption of correctness is not evidential in character. It is not a substitute for evidence of the character required in order to show that a conveyance or transfer comes within the ambit of the statute where substantial evidence to the contrary is present. *Heiner v. Donnan,* 285 U.S. 312; *Del Vecchio v. Bowers,* 296 U.S. 280; *N. Y. Life Insurance Company v. Gamer,* 303 U.S. 161.

THE DECISION OF THE CIRCUIT COURT THAT THE RIGHT TO SUBSTITUTE SECURITIES WAS EQUIVALENT TO THE RIGHT TO "ALTER, AMEND OR REVOKE," CONFLICTS IN PRINCIPLE WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL.

There is a recognized line of cases holding that a power reserved to the settlor, the exercise of which affects the mere mechanics of an irrevocable trust, is not to be considered within the phrase "alter, amend or revoke" as used in Section 302(d) of the Revenue Act. *Dort v. Helvering,* 69 F. (2d) 836, Certiorari denied 293 U.S. 569; *Reinecke v. Northern Trust Company,* 278 U.S. 339.

The statute specifies only a power to *"change"* by alteration, amendment or revocation, the "enjoyment of the property." The cases have construed this "power" to mean that there must exist the right to change the economic benefits flowing to the beneficiaries. *Porter v. Commissioner,* 288 U.S. 436.

The power in question, therefore, must be at the least a power to *change the enjoyment* of the economic benefits flowing to the beneficiaries and if there is no "change" involved in the "substitution" of securities in an irrevocable trust set up for an express purpose, then the "power of substitution" is clearly not a power to "alter, amend or revoke" the trust instrument.

The purpose of the settlor in creating the trust is expressed therein as follows: (R. 77 a)

> "WHEREAS, the Settlor is *desirous* of providing a *competence for his two daughters* for and during the term of their natural lives with certain limitations thereon and is desirous of depositing with the Trustee certain *securities* and/or *monies* to carry out the purpose aforesaid; * * *" (Italics supplied).

The only possible substitution the trustee could accept would be of money or securities capable of providing the desired "competence". A court of equity would not permit other than an equitable substitution reasonably equivalent in character and value. The court's construction of the term "substitution" as potentially permitting the substitution for the benefit of the settlor rather than of the beneficiaries, is totally unwarranted.

Statutes levying taxes are not to be extended beyond the clear meaning of the terms used in the Act. *Old Colony R. Company v. Commissioner,* 284 U. S. 552, 560; *Renton Investment Company v. Commissioner,* 131 F. (2d) 330, (C.C.A. 3); *Gould v. Gould,* 245 U. S. 151.

Giving to the phrase "the right to make any substitution" its normal and intended meaning, it is apparent that such right would in no way affect the beneficiaries' enjoyment of the economic benefits of the trust and would be the equivalent of a power affecting merely the mechanics of the trust and not the quality of the beneficiaries' rights and enjoyment. Even if the opposite construction is accepted, a substitution would only affect the *quantity* of the beneficiaries' enjoyment in the sense that the corpus of the trust might thereby be increased or decreased. In the instant case the corpus of the trust was increased more than $2,000.00 by reason of the various substitutions . (R. 73 a)

Conclusion.

For the foregoing reasons it is submitted that a Writ of Certiorari should issue to the Circuit Court of Appeals for the Third Circuit.

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